

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

**IN THE MATTER OF
RONALD KEEN, RICHARD FIGURELLE,
JOHN DOHERTY and PHYLLIS RYAN,**

Apellant,

v.

DEPARTMENT OF CORRECTION,

Agency.

**DOCKET NOS. 98-04-149; 98-04-150;
98-04-151; 98-04-152**

ORDER GRANTING MOTION TO DISMISS

BEFORE Dallas Green, John F. Schmutz, Esquire, and John W. Pitts, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Grievants:

Ronald Keen, pro se
Richard Figurelle, pro se
John Doherty, pro se
Phyllis Ryan, pro se

For the Agency:

Joelle P. Hitch
Deputy Attorney General
Office of the Attorney General
820 N. French Street
Wilmington, DE 19801

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NATURE AND STATE OF THE PROCEEDINGS

The Grievants are Probation and Parole Supervisors employed by the Department of Correction. The Board has consolidated these dockets for convenience in consideration. According to the Grievants, in 1993, the Department of Correction and the State Personnel Office created and implemented a Regional Manager Classification in the Bureau of Community Corrections. The Grievants assert that the Manager classification was established at paygrade 18 and that the Manager classification was designed as an intermediate step between the Supervisor (paygrade 15) classification and the Director (paygrade 21) classification.

The Grievants take the position that the specifications for the Manager classification were drawn from the specifications of the existing Supervisor classification and that the minimum requirements for both positions as well as the principle accountabilities of both positions were and remain very similar while there is a marked disparity in the pay for each classification.

Grievants assert that they are grieving a misapplication of Merit Rule No. 3.0100 which requires that:

Positions substantially alike in duties and responsibilities, requiring essentially the same knowledge, skills and abilities, license or professional certification for satisfactory performance, and using the same minimum education and experience requirements, shall be grouped into the same class and the same rates of pay under similar working conditions shall be applicable thereto.

Grievants have pursued their individual grievances through the steps of the grievance procedure (see Merit Rule 20.300) without a satisfactory resolution.

On April 2, 1998, Grievants filed an appeal with the Board after a March 19, 1998 Memorandum from Thomas LoFaro, Deputy Director for Employee Relations, "dismissing" Grievants' "Step 4 Classification Grievance."

By Motion dated April 28, 1998, the Department of Corrections moved to dismiss these grievances on the basis that each complaint relates to a substantive policy under the Merit Rules and as such is not a "grievance" as defined by the Merit Rules. The Department asserts that the Grievants' complaint should be dismissed for failure to state a claim for which relief can be granted and because the Board lacks jurisdiction to hear a matter outside the scope of the Merit Rules. The Department contends that, to the extent that the Grievants are asserting

that the Board should review a Maintenance Reclassification done in 1993, such appeal is untimely and must be dismissed. The Department also contends that the Board is without jurisdiction to consider either Critical Reclassification or to consider appeals of paygrade determinations. *Smyth v. Department of Transportation*, MERB decision Docket No. 97-12-111 (June 19, 1997) and Budget Act FY 98 at page 64, line 5, and FY 99 Budget Act at page 60, line 11. Grievants were afforded an opportunity to provide a written response to the Department's Motion to Dismiss and filed such response on May 27, 1998.

DISCUSSION AND DECISION

It is apparent that the Grievants have identified classifications within the Merit System where they genuinely believe there is a substantial disparity in paygrade for what they perceive as essentially the same or very similar job descriptions. They see Managers occupying positions they believe have substantially the same job requirements as Supervisors but who are being compensated at a level that is three paygrades higher. They seek redress for this perceived inequity within the Merit System. They do not have the support of either the State Personnel Office or their agency which has moved to dismiss the grievance appeals.

Assuming, for the purposes of discussion only, that there is merit to the Grievants' contentions and assuming that there is a substantial discrepancy between paygrades for jobs with substantially the same requirements and duties, this is a situation which the Office of State Personnel should be willing to correct. The Merit Employee Relations Board, however, does not have the jurisdiction to reach the merits of these grievances. The planning and conducting of maintenance reviews is within the discretion of the Director. *See* Merit Rule Nos. 3.1000 and 3.0800. These grievances are not over Maintenance Reclassification Decisions which the Board can review under 29 Del. C. § 5915. Nor are critical reclassifications or paygrade determinations within the Board's jurisdiction. *Smyth v. Department of Transportation*, MERB Decision Docket No. 97-12-111 (June 19, 1997).

The Deputy Director for Employee Relations, in his Memorandum dismissing the Grievants' request that their positions as Probation and Parole Supervisors be upgraded, stated as follows:

There are two methods of reclassifying positions. The first one can occur via the Maintenance Review Process. The decisions arising from this process may be appealed directly to the Merit Employee Relations Board (MERB) -- although the Budget Act specifies that 'Paygrade determinations shall not be

appealed.' (FY 99 Budget Act at page 60, line 11). However, unless there is a specific Maintenance Review decision made in accordance with the standards set forth in Merit Rule 3.1010 -- and there is nothing in the grievance record in your case which indicates that this has occurred, there would be no basis upon which to file a grievance.

The other method of reclassifying positions may occur via a Critical Reclassification Request, which must be made by agency management. There is nothing in the grievance record of this case which indicates that any such request was made by the Department of Correction. In any event, Critical Reclassification decisions are neither grievable nor may they be appealed to the MERB (FY 99 Budget Act at page 60, lines 17-18).

This recitation by the Deputy Director is fundamentally correct, and highlights the absence of a formal mechanism at the Office of State Personnel for resolving employee perceived inequities in the administration of the classification system which the Director is to establish and maintain current under Chapter 3.000 of the Merit Rules.

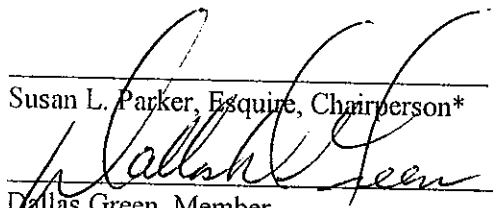
The Merit Employee Relations Board is limited in its authority by statute. *Cunningham v. Department of Health and Social Services*, 1996 WL 190757 (Del. Super., March 27, 1996) (C.A. No. 95A-10-003 HDR), *aff'd* by Order, Del. Supr., 679 A.2d 469 (June 3, 1996) (Rehearing denied, June 13, 1996); *Maxwell v. Vetter*, Del. Supr., 311 A.2d 864 (1973). The Board is therefore not in a position to treat the Grievants' appeals as timely filed appeals of a Maintenance Review Classification because they are not, in fact, timely filed Maintenance Review Classification appeals under 29 Del. C. § 5915. Nor, as the Department correctly notes, is the Board able to consider these matters as paygrade grievances or Critical Reclassification appeals as the Board is statutorily without jurisdiction to consider such matters. Therefore, the Board is required to dismiss these grievances for a lack of jurisdiction to hear them. However, by a copy of this document provided to the Director of the Office of State Personnel, the Board strongly suggests consideration be given to the feasibility of an explicit employee initiated process for securing a determination from the State Personnel Office as to whether inequitable situation exists between two (2) or more classifications. Such a determination could be available at the instigation of an employee or group of employees and should serve to highlight areas which are ripe for maintenance review. A significant part of the frustration exhibited by these Grievants can be directly

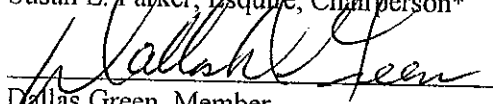
traced to their perception of an inability to get responses to their concerns through the personnel systems at the Department of Corrections or the Office of State Personnel.

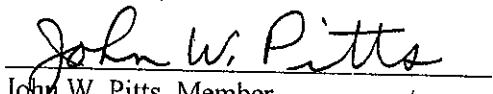
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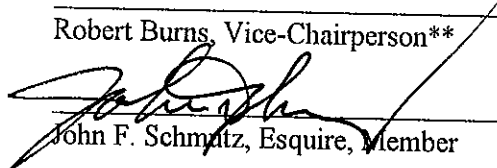
On the basis of the foregoing, the above-captioned grievances are **DISMISSED** for lack of jurisdiction. The Director of State Personnel is requested pursuant to 29 Del. C. §5907(1) to review the complaints giving rise to the subject grievances and to consider the feasibility of developing and publicizing to State employees a method for having apparent discrepancies between and among classifications considered by the State Personnel Office pursuant to an employee request in addition to an agency request with a written response being provided to the employee(s).

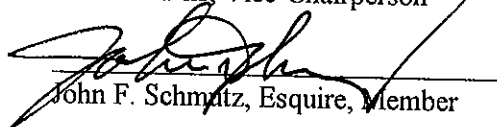
BY ORDER OF THE BOARD.


Susan L. Parker, Esquire, Chairperson*


Dallas Green, Member


John W. Pitts, Member


Robert Burns, Vice-Chairperson**


John F. Schmatz, Esquire, Member

* Chairperson, Susan L. Parker, Esquire, did not participate in these matters because of a litigation conflict with the Department of Correction.

** Vice-Chairperson, Robert Burns was unavoidably absent from the argument and deliberation.

APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the request of whether the appointing agency acted in accordance with the law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within thirty (30) days of the day the notice of the decision was mailed.
- (c) the appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date:

Nov. 19, 1998 *JK*

Distribution:

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Agency's Representative

Merit Employee Relations Board

Susan L. Parker, Esquire, Chairperson

Robert Burns, Vice Chairperson

Dallas Green, Member

John F. Schmutz, Esquire, Member

John W. Pitts, Member